UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

VW CREDIT, INC.

and **Case 13-CA-158715**

KELLEY HELLMAN, AN INDIVIDUAL

VOLKSWAGEN GROUP OF AMERICA, INC.

and **Case 13-CA-166961**

KELLEY HELLMAN, AN INDIVIDUAL

GENERAL COUNSEL'S ANSWERING BRIEF

Respondents' Opening Brief to the Board makes three general arguments. First, Respondents offer a tortured reading of the Agreement to Arbitrate (Agreement) by focusing on the introduction paragraph to claim that a reasonable employee would construe the agreement as permitting the filing of Board charges. However, for the reasons described below, the Board should reject Respondents' illogical and factually unsupported reading of both the introduction paragraph itself, and the Agreement as a whole. Second, Respondents claim that their attempt to remedy the unlawfulness of the Agreements by revising them via its own notices to the employees sufficiently repudiated any unlawfulness based on the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). For the reasons discussed below, however, the Board should reject Respondents creative but ultimately unavailing arguments. Finally, Respondents resort to the assertion that the Board should overturn several of its own prior decisions that would clearly still render the revised Agreement unlawful. Because those decisions are well-reasoned, as discussed below, the Board should adhere to its precedent and reject Respondents argument.

I. Contrary to Respondents Claims, a Reasonable Employee Would Clearly Construe the Agreement to Prohibit filing Board Charges

Respondents make three primary arguments in support of their claim that the Agreement does not unlawfully prohibit filing Board charges. First, Respondents focus almost exclusively on two sentences in the first paragraph of the Agreement. Respondents then urge the Board to read these two sentences in isolation from both the rest of introduction paragraph, and also to the exclusion of the remaining paragraphs of the Agreement. Second, Respondents improperly rely on the word "court" in paragraph one to distinguish this case from established Board law. Respondents stress that a reasonable employee understands the difference between a "court" system and an administrative system. Not only are these two assertions immensely flawed and illogical in their own right, but Respondents rely on several facts that are not in the record to support their flawed claims. Finally, Respondents provide unsound reasoning in an effort to distinguish Respondent's Agreement from similar agreements in several Board cases. For the reasons discussed below, the slight variations between Respondents' Agreement and other similar agreements fail to provide the support Respondents claim that its Agreement is lawful.

At the outset, Respondents argue that the first paragraph of the Agreement "plainly limits it to disputes traditionally resolved through a lawsuit filed in a Court." (Resp. Br. P. 7) The first paragraph of the Agreement reads as follows:

> Introduction. In any organization, disputes will arise from time to time. Occasionally, these disputes need to be resolved in a formal proceeding. *Traditionally, this has taken place in the courts after a lawsuit has been filed. However, too often, our court system has proven itself to be exceedingly costly and time consuming*. In order to obtain a ruling on future disputes without the costly expense and lengthy delays typically associated with court actions, Employee and VWGoA agree to submit (with exceptions noted below) claims or controversies relating to Employee's employment (or the termination of that employment) to final and binding arbitration before a neutral arbitrator and not to any court, as specified in greater detail below." (emphasis added)

Respondents argue that a reasonable employee, after reading this introduction paragraph, would understand that the Agreement only applies to disputes that require accessing the court system.

Respondents' arguments, however, are plainly flawed for several reasons. For one, Respondents continue isolating the italicized portion of the language in paragraph one to support their claim that a reasonable employee, upon reading that portion, would distinguish a court system from an administrative system. This is despite the fact that the introduction starts out mentioning "disputes", then mentions "formal proceedings". While initially less formal than immediately filing a lawsuit, filing a charge with a federal agency such as the NLRB can hardly be considered *informal* since it requires signing a charge, under oath, and asking the agency to conduct a formal investigation. Also, the inclusion of the word "traditionally" suggests that other types of formal proceedings besides lawsuits are meant to be included in the Agreement. In other words, "traditionally" suggests an understanding of "*that's how it was done in the past, but nowadays things are different"* rather than as an attempt to limit the Agreement to only actions that start out in court as Respondents claim. And immediately after deriding the "court system" for its perceived shortcomings ("exceedingly costly and time consuming") the introduction again uses extremely broad language in describing what is intended to be included under the agreement: "claims or controversies relating to employment." While the final sentence of this paragraph has an express prohibition against bringing employment claims before "any court," given the breadth of the description of covered claims just before that, a reasonable employee would clearly believe this includes charges brought before the NLRB.

Moreover, directly following the introduction paragraph, part two of the Agreement states that "[*a*]*ny and all disputes* which involve or relate *in any way* to Employee's employment (or termination of employment with [Volkswagen] . . .shall be submitted to and resolved by final

and binding arbitration" (emphasis added). Given this type of broad language immediately following the introduction it is simply unreasonable to claim that a typical employee would delineate between filing a charge about her termination and filing a lawsuit. Indeed, this type of contrived parsing of words is precisely what the Board cautions against, as Respondents concede. (Resp. Br. P. 6, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)(the Board should "give the rule a reasonable reading" and "refrain from reading particular phrases in isolation"). Yet Respondents ask the Board to do just that.

Second, Respondents assume that a reasonable employee understands the difference between the "court system" and an administrative system. Respondents assert that employees can distinguish between these two processes because of "required posters and other general familiarity." (Resp. Br. P.8). However, the NLRB, unlike the EEOC, which Respondents cite in their Brief, does not require employers to post general information about their rights under the Act, or their right to file charges with the NLRB. Thus, there is virtually no way for a reasonable employee to distinguish the NLRB process from the "court system" unless they have some other basis of knowledge which Respondents have failed to identify. Additionally, it's unclear how Respondents arrived at the conclusion that "employees understand that they generally have three ways to resolve [a] dispute" (Resp. Br., P. 7). The record fails to establish that Respondents have supplied employees with any guidance on how to resolve disputes. Thus, Respondents cannot now assert that employees have any basis for understanding a process that based on the record, does not exist. Accordingly, since neither of the two supposed understandings of the employees subject to this Agreement have been shown to exist Respondents proffered reading of the agreement is fundamentally flawed and must be rejected.

Furthermore, "[t]he Board has rejected similar arguments [attempting to distinguish court and administrative processes] . . .noting that typical 'nonlawyer employees' do not have specialized legal knowledge to making the fine distinction between administrative and judicial processes." *Century Fast Foods, Inc.* 363 NLRB No. 97, slip op. at 10-11 (2016) (The Board rejected the employer's argument that the phrase "I agree to confidential arbitration, instead of going to court, for any claims" negated any unlawful interference). Thus, there is effectively no way for a reasonable employee to read paragraph one and believe that bringing charges to the NLRB is permissible.

Third, Respondents contend that *U-Haul Co. of California*, 347 NLRB 375 (2006) is somehow not appropriately applied here. Respondents suggest that a reasonable employee would "attempt to read [the conflicting] contractual provisions to be consistent when such a reading is possible". (Resp. Br. P. 10) However, to support this proposition, Respondents cite to the "well-known canon of contractual construction" used by courts to harmonize a contract's provisions when possible. (Resp. Br. P. 10, FN 4) Respondents' reasoning is flawed. Expecting a reasonable employee to utilize this advanced legal approach is patently inappropriate. While Respondents attempt to paint this legal canon as mere common sense, such a claim fails because Respondents consider it in the context of two typical contracting parties. While it may be true that normally both parties to a contract have an interest in avoiding irreconcilable conflicts, here, the Agreement is foisted upon employees as a required pre-condition of obtaining employment. It defies logic to expect reasonable employees to have the same concern about potentially conflicting provisions as Respondents expect in this situation.

In addition, Respondents have again relied on the first paragraph of the Agreement to distinguish it from the agreement in *U-Haul Co. of California*. For the reasons explained above,

however, the Agreement's introductory paragraph does nothing to clear up the ambiguity throughout the Agreement. Respondents insist that the introductory paragraph places no limitation on the Board's processes. However, even if a reasonable employee could distinguish between the judicial and administrative systems, the remaining language in the Agreement would conflict with that understanding. For example, a portion of paragraph four explicitly states that:

> This Agreement is intended to cover all civil claims which relate in any way to my employment (or termination of employment) with [Volkswagen] including . . . (any local, state or federal law concerning employment or employment discrimination).

By virtue of this paragraph, Respondents have completely contradicted their argument that the Agreement does not restrict access to the government's administrative processes. The National Labor Relations Act is a federal law. According to paragraph four of Respondents' Agreement, claims made outside the arbitration process relating to any federal law are clearly prohibited by the Agreement. A reasonable employee tasked with reconciling paragraph one of the Agreement with the conflicting language in paragraph four would be exceptionally hard-pressed to conclude that the Agreement does not apply to government agencies—mainly because the Agreement explicitly restricts federal law claims.

Thus, Respondents attempt to distinguish its Agreement from the one in *U-Haul Co. of California* by stressing that paragraph one clears up any misunderstandings, is unsuccessful. As noted above, paragraph one's alleged limitation to the "court system" is unclear and in any event is immediately contradicted by paragraphs two and four. Therefore, any reliance on paragraph one to differentiate Respondents' Agreement from the one in *U-Haul Co. of California* cannot stand.

Respondents also try to distinguish their Agreement from the arbitration agreement the Board found unlawful in *Countrywide Financial Corp,* 362 NLRB No. 165 (2015) by again

suggesting that the introduction paragraph of the Agreement here is limited to lawsuits filed in court. However, for the same reasons described above, the Agreement's introductory paragraph does no such thing, and thus cannot be distinguished from the agreement in *Countrywide Financial Corp*.

Finally, Respondents surmise that the General Counsel's position is that if Board charges were included among the list of exemptions to the Agreement, the General Counsel would deem the Agreement acceptable. Respondents then claim that because the list of exemptions would be read by a reasonable employee as mere examples, not as an exhaustive list, the Agreement passes muster.

Respondents' argument is wrong as a matter of both law and fact. Even assuming that the Agreement did name the NLRB in its "non-exhaustive" list of exemptions, it would still be unlawful. The Board has rejected the argument that such savings clauses are effective to turn an unlawful restriction on Section 7 rights into a lawful voluntary agreement. See *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 2, 4-5 (2015) (agreement found unlawful even though it permitted employees to file claims with the Board); *Murphy Oil USA*, 361 NLRB No. 72 (2014).

Even if they had the law on their side, Respondents' argument in this regard would be ineffective, mainly because the assumption that a reasonable employee would know the list is merely meant as a non-exhaustive list is simply too great a leap. In addition, to make this proposition, Respondents again rely on the unsupported assumption that employees somehow *just know* there is some internal employer process to resolve employment disputes or claims, and that the next option if that alleged internal process fails is filing a claim with the government. Then, according to Respondents, only after the government claim or charge fails to resolve the issue does the Agreement come into play. Because there is no support in the record for these

assumptions, this argument fails. But Respondents nonetheless go on to then assume that employees would differentiate between "example" lists of permissible government options to resolve disputes versus "exhaustive" lists. Respondents legalistic reading is, put simply, not reasonable. In multiple places in the Agreement, there is broad language that any reasonable employee would think covers any possible claim. Thus, there is no basis to assume that a reasonable employee would read the agreement as Respondents suggest, and their arguments to the contrary should be rejected.

II. Respondents' Notices do not Repudiate the Unlawfulness of the Agreement

Respondents contend that they have satisfied all of the requirements under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) when they posted their October 2015 and January 2016 Notices. For the reasons explained below, Respondents' notices were not issued in a timely manner, do not insure employees that Respondents will not interfere with their Section 7 rights in the future and do not admit any wrongdoing. Thus, Respondents have not satisfied the *Passavant* requirements.

Even if we assumed, *arguendo*, that the language in Respondents' Notices was sufficient to remedy the violations, simply posting these Notices in the manner Respondents did here would not be sufficient to remedy the violation. Indeed, all of Respondents' arguments concerning the "revised" Agreement are premised on a flawed understanding that providing employees with these updated Notices was sufficient. However, that is not the case. Respondents must rescind the existing unlawfully overbroad Agreement. If they wish to then issue a revised Agreement to take its place, they are free to do so, so long as the revised agreement was itself lawful. Under the procedure utilized by Respondents, employees do not receive a revised agreement, they only have a one page notice that references a document (the Agreement) that can likely only be found in their personnel files. A reasonable employee who receives a Notice that

references a document they signed, perhaps several years ago, hardly provides the type of remedy conceived in *Passavant Memorial Area Hospital*, 237 NLRB 138, (1978). See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 380 (2006)(remedy included removing all unlawful waivers from employer's files and notifying employees in writing that this had been done and that the waivers would not be used against them in any way, in addition to posting a traditional Board notice); *Rio All-Suites Hotel*, 362 NLRB No. 190 (2015) (unlawful handbook remedy included providing employees with inserts for the handbook that either rescind the unlawful provisions or providing adhesive-backed lawfully worded provisions to cover the unlawful provisions, or publishing and distributing a new handbook without the unlawful provisions or with lawfully worded provisions). Thus, the Board should not accept Respondents' insufficient attempt to remedy this violation.

A. The Notices were not issued in a timely manner

Despite the foregoing fatal flaw in Respondents' *Passavant* argument, Respondents press on with additional, but likewise ultimately unsuccessful arguments about its attempted remedy. First, Respondents argue that they posted both notices in a timely fashion because the notices were posted shortly after learning that the Region considered the Agreement unlawful. The facts, and the cases cited by Respondents to support this proposition, do not support this claim. The assertion that either Respondent timely notified the employees of the revised Agreement is simply inaccurate.

With respect to Respondent VW Credit, it waited until after the Region issued complaint, which only happens several days, if not weeks, after a party is notified of a Regional determination. With respect to Respondent VWGoA, the charge, which challenged the identical Agreement at the rest of Respondent's entities, was filed on January 4, 2016, and at that time Respondent VWGoA knew, or should have known, that the Region would find the Agreement

unlawful. Yet Respondent VWGoA waited more than three weeks to notify those employees of the revision. Thus, it is simply factually inaccurate to assert that either Respondent revised the Agreement via the notices to employees "promptly upon learning that the Regional Office considered the Agreement to be unlawful." (Resp. Br. P. 15)

Therefore, Respondents' reliance on *Broyhill Co.*, 260 NLRB 1366, 1366 (1982) and *Extendicare Health Services, Inc.*, 350 NLRB 184, 193 (2007) are plainly misplaced. *Broyhill* is inapposite. It concerned oral statements by a single supervisor that the employer did not learn of until after the charge was filed. Thus, the Board found a repudiation timely despite five weeks passing before the employer's repudiation. *Id.* However, in that case, the repudiation occurred immediately after the employer was placed on notice of the unlawful action. *Id.* Specifically, a week after an amended charge was filed, the employer learned about the unlawful statements from the Board Agent conducting the investigation. *Id.* The *following day*, before even a Regional determination, much less a formal complaint, the employer posted a notice repudiating the supervisor's statements. *Id.* The Board found that the employer acted timely because the employer initially "lacked knowledge" of the unlawful conduct.

The facts in the instant case are vastly different. Rather than recently-made oral statements made to a few employees, this case concerns a mandatory arbitration agreement used by Respondents for several years, at least, for nearly all of its employees. Unlike the charge in *Broyhill*, the charges here clearly stated the allegations in question. Thus, Respondents were on notice as of August 25, 2015, that the Agreement was being challenged. Moreover, in *Broyhill* the employer repudiated the statements prior to any determination on the merits, much less the issuance of a complaint. Conversely, here, Respondents waited until after issuance of the first Complaint to try and remedy the violations. Respondents waited months before taking any action

to renounce the unlawful Agreement. Thus, no exception should be made for Respondents untimely attempt to repudiate its unlawful Agreement.

Respondents reliance on *Extendicare Health Services, Inc.*, 350 NLRB 184, 193 (2007) is similarly unavailing. In *Extendicare Health Services*, the issue was a $0.75 price increase to the cost of employees' breakfast and lunch. *Id.* at 192. The Board concluded that "given the relatively minor importance of the 75 cent price increase, Respondent's April 30 and May 7 memoranda are sufficient to cure the violation of Section 8(a)(5) despite the fact that the repudiation does not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity". *Id.* at 193.

Here, the violation is not similarly "minor". The Agreement in this case would lead a reasonable employee to believe that she does not have access to the Board's processes. Moreover, unlike here, the employer in *Extendicare Health Services* repudiated the unlawful conduct *the same day* that the Region informed the employer that it would issue complaint. Respondents, on the other hand, waited until after complaint issued. Respondent VWGoA knew the Region would issue Complaint in its case, as the January 4, 2016, charge against VWGoA contained the exact same allegation concerning the exact same Agreement as the August 25, 2015, charge against VW Credit. Yet, Respondent VWGoA failed to act for over three weeks after the charge was filed. Under these circumstances, the repudiation was plainly untimely.

B. The notices do not insure employees that Respondents will not interfere with their Section 7 rights in the future and do not admit any wrongdoing

Respondents argue that the notices were sufficient because they identify the Agreement and clarify that the Agreement does not prohibit filing Board charges. However, Respondents' notices simply offer clarification and do not serve to repudiate the unlawful nature of the Agreement.

In *Passavant* the Board "pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights". 237 NLRB 138, 139 (1978). Respondents have failed at offering such assurances to their employees here. Respondents' notices do not insure that employee's rights will not be violated in the future. Instead the notices simply indicate that the Agreement is being revised to permit them to file Board charges rather than being restricted to arbitration. The notices fail to address Respondents future conduct beyond the Agreement itself. In other words, despite the revision, Respondents do no assure employees that they will not in any other way restrain or coerce employees in the exercise of their Section 7 rights. Thus, the notices do not satisfy the requirements under *Passavant*.

Furthermore, the Board has held that a repudiation "couched in terms to avoid the admission of wrongdoing" will not "meet the Board's test for repudiation of an unfair labor practice". *Branch Int'l Services*, 310 NLRB No. 1092, 1105-06 (1993). But that is precisely what Respondent did here. Respondents' notices avoid making any admissions of wrongdoing, and instead state "[t]he board thought that we could be clearer that the Arbitration Agreement does not restrict your rights to file charges with the NLRB." Respondents characterization of its unlawful action as unclear, does not meet the Board's test for repudiation of an unfair labor practice.

III. Respondents' amended Agreement is still unlawful because it merely creates more ambiguity

Next, Respondents argue that no Board cases render its savings clause unlawful. Ironically, Respondents then go on to cite several Board cases that found similar savings clauses insufficient. Respondents' attempt to distinguish their own savings clause from the clauses in those cases, by arguing that Respondents' savings clause "is clearer than the savings clauses

rejected by the Board in those decisions" (Resp. Br. P. 21). Respondents' arguments should be rejected.

First, Respondents argue that the reason the Board rejected savings clauses in *2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1817 (2011); and *Countrywide*, 362 NLRB No. 165, slip op. at 1-3 (2015), was because those savings clauses were generically worded. Respondents argue that in this case, the amended Agreement based on the notices specifically permits filing Board charges because the Agreement states that it "does not restrict you rights to file charges with the NLRB." However, even language as specific as this has been rejected by the Board. In fact, Respondents acknowledge two leading cases where the Board has held that a specific savings clause could not render an arbitration provision lawful under the Act: *SolarCity Corp.*, 363 NLRB No. 83 (2015) and *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016) (Resp. Br. P. 21).

Respondents attempt to distinguish their amended Agreement from *SolarCity* and *Securitas* by arguing that here the savings clause is not surrounded by other ambiguous language which renders the Amended Agreement lawful. (Resp. Br. P. 23). However, Respondents' amended Agreement is filled with ambiguity. Specifically, the added sentence plainly contradicts the language in the original Agreement. As noted above, the Agreement broadly references claims based on violations of "public policy or statute," which employees would reasonably believe includes the Act. For example, paragraph four of the Agreement specifically states that "covered claims" include: "*all civil claims which relate in any way to my employment (or termination of employment) . . .* [and] *claims based on violation of public policy or statute . . .*" (emphasis added). This broad language coupled with the language in the amended Agreement creates the ambiguity Respondents claim does not exist.

Similarly, paragraph two of the Agreement expressly states that "*any and all disputes which involve or relate in any way to Employee's employment (or termination of employment)* . . . be submitted to and resolved by final and binding arbitration[]" (emphasis added). Thus, this paragraph would also directly contradict the language in the amended Agreement. Respondent seems to believe that the addition of "only one sentence to the Agreement" that "is set off from the rest of the text" renders the Amended Agreement lawful. (Resp. Br. P. 23). However, the location and length of text here is insignificant given that when read together, the language is still conflicting. As specified in *Lutheran Heritage*, rules similar to the Agreement here, should be "read as a whole" in construing their legality. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Here, a reasonable employee, unfamiliar with the legal minutiae of the cannons of contract construction, would be left to wonder how to reconcile the agreement as a whole.

Next, Respondents assert that the only reason the Board found the Agreements unlawful in *SolarCity* and *Securitas* is because the savings clauses were ambiguous *only* when combined with the "caveats" that immediately preceded them and which employees lacked the specialized knowledge to understand. (Resp. Br. P. 25). Respondents argue that because no such "caveats" exist here, the savings clause is lawful. However, the Board has found that savings clauses paired with other broad language will render an agreement unlawful.

For example, in *Acuity Specialty Products Inc.*, the Board examined an Alternative Dispute Resolution (ADR) policy that specifically exempted "matters within the jurisdiction of the National Labor Relations Board". 363 NLRB No. 192 (2016). This exemption was followed by a list of several "covered claims" which included "violations of any . . .federal . . .statute", similar to the Agreement here. *Id.* The Board adopted the Administrative Law Judge's decision holding "that a reasonable employee would be unable to discern the difference between any

number of "covered claims" and those which fall within the jurisdiction of the National Labor Relations Board . . ." rendering the ADR policy unlawful. *Id.*

In a similar case, the Board found a release form with an identical savings clause unlawful. There, the release obligated employees "not to . . . assist, join, participate in, or actively cooperate in the pursuit of Wage Claims . . ." *Allied Mechanical*, 349 NLRB 1077, 1084 (2007). However, the preceding paragraph stated "unless . . . permitted by federal . . .law including but not limited to the National Labor Relations Act." *Id.* There the Board reasoned that " . . .the second portion [the savings clause] cancels the first but only if the signatory employee is knowledgeable enough to understand the Act permits the very thing prohibited in the first portion." *Id.*

The same reasoning should apply here. Respondents' saving clause could only stand to cancel out the preceding language if a reasonable employee understood that the National Labor Relations Board permits filing "claims which relate in any way to my employment (or termination of employment) . . ." which Respondents' agreement specifically prohibits.

IV. The Board should not abandon any precedent in order to find the amended Agreement lawful

Finally Respondents argue that even if the amended Agreement is still unlawful under the decisions in *SolarCity* and *Securitas*, that the Board should overrule both cases. Respondents argue that these cases should be rejected because "they found that arbitration agreements would chill employees' exercise of their right to file Board charges despite that those agreements contained perfectly clear statements that they do *not* restrict the right to file Board charges" (Resp. Br. P. 28). However, as explained above, a reasonable employee tasked with reconciling the language in the Agreement paired with the language in the savings clause would have significant difficulty given the conflicting terms.

Next, Respondents argue that the Board misapplied *Lutheran Heritage* in order to reach the decisions in *SolarCity* and *Securitas*. However, both *SolarCity* and *Securitas* correctly apply *Lutheran Heritage*. The fact that Respondents disagrees with the application used by the Board hardly supports the conclusion that the Board abused its authority.

Respondents again cling to their argument that the language in the savings clause can only be read one way—as permitting employees to file charges with the NLRB. However, as described in detail above, a reasonable employee reading the amended Agreement in its entirety would either be confused at the conflicting language, or would not have the basis of knowledge to understand that the NLRB covers many of the types of claims specifically prohibited by the amended Agreement. It is not inconceivable that a reasonable employee would read conflicting language in a contract and definitively understand how to apply it. Respondent asserts that a reasonable employee would read a rule to mean what it says versus reading a rule to mean the opposite of what it says. However, if a rule, like the Agreement here, states that an employee is prevented from filing "claims that relate in any way to my employment (or termination of employment)" is followed by language, in a separate document, no less, that states "[t]his Agreement does not restrict your rights to file charges with the NLRB" a reasonable employee would be confused about what is permissible.

Finally, Respondents assert that *SolarCity* and *Securitas* violate the Federal Arbitration Act ("FAA") because "'[r]ules aimed at destroying arbitration' violate the FAA" (Resp. Br. P. 32) citing *At&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Yet, at no point does the Board in *SolarCity* or *Securitas* indicate a desire to destroy arbitration. In fact, the Board's only concern is insuring that arbitration agreements like the ones in *SolarCity*, *Securitas,* and here, do not violate the Act, here by preventing employees from filing charges with the Board.

Furthermore, the Board's decisions in *SolarCity* and *Securitas* are limited to the specific agreements in those cases, thus any indication by Respondents that "[t]he Board has . . . established a *de facto* policy of invalidating every arbitration agreement" is unfounded (Resp. Br. P. 33).

V. Conclusion

For the reasons described above, Counsel for the General Counsel respectfully requests that the Board find the Agreement violated the Act as alleged, and that Respondent's attempt to remedy the violation via its Notices to employees were insufficient to remedy that violation.

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CERTIFICATE OF SERVICE

The undersigned hereby certified that copies of the **Counsel for the General Counsel's Answering Brief to the National Labor Relations Board** has been electronically filed with the Executive Secretary and served upon the following parties via electronic mail this 23rd day of January, 2017.

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